Haynes-Trane Service Agency, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 208. Case 27-CA-6503(E)

December 14, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 28, 1981,[1] the Board issued its Decision and Order[2] dismissing the complaint in the underlying unfair labor practice case in its entirety. Thereafter, on November 30, pursuant to the Equal Access to Justice Act[3] (hereinafter EAJA), Respondent in the unfair labor practice case (hereinafter the Applicant) submitted an application for an award of attorney's fees and other expenses incurred in connection with the litigation of that case. The Board transferred the application to Administrative Law Judge James M. Kennedy for ruling and, on May 19, 1982, he issued the attached Decision in this proceeding awarding the Applicant the sum of $14,137.60. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Applicant filed an answering brief and a motion to dismiss the General Counsel's exceptions. The General Counsel filed a memorandum opposing the Applicant's motion, as well as a motion to strike certain portions of the Applicant's answering brief. The Applicant filed a memorandum in opposition to the General Counsel's motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to dismiss the application for attorney's fees and expenses, *sua sponte*, for lack of jurisdiction, as the Applicant failed to submit the application within the specified jurisdictional time period.[4]

As previously indicated, the Board entered its final Order in the underlying unfair labor practice case on October 28. The Applicant mailed the instant application on Tuesday, November 24, and the Board received the application on Monday, November 30, 33 days after the entry of the Board's final Order.

EAJA, section 504(a)(2), provides that a party seeking attorney's fees and costs "shall, within 30 days of a final disposition in the adversary adjudication, submit . . . an application" to the Board. Pursuant to section 504(c)(1) of EAJA, the Board issued procedural rules for the submission and consideration of applications for award. Section 102.148(a) provides that the jurisdictional time period begins to run from the date of the Board's final order, and that an application must be "filed" no later than the 30th day after the entry of that order.[5] According to Section 102.114(b) of the Board's Rules, "filing" is accomplished when the Board receives the document to be filed.

In *Monark Boat Company, supra*, the Board found that the 30-day filing period is a jurisdictional prerequisite to application under EAJA which the Board has no legal authority to extend. Consequently, where an applicant fails to comply with the specified jurisdictional time period, this Agency is without jurisdiction to pass upon the merits of the application. Here, Respondent's application having been filed on November 30, the 33rd day after final judgment,[6] we are therefore compelled to dismiss said application for lack of jurisdiction.

ORDER

It is hereby ordered that the application of the Applicant, Haynes-Trane Service Agency, Inc., Englewood, Colorado, for an award under the Equal Access to Justice Act be, and it hereby is, dismissed.

[1] All dates herein are in 1981 unless otherwise indicated.

[2] 259 NLRB 83.

[3] 5 U.S.C. § 504 (1982).

[4] *Monark Boat Company*, 262 NLRB 994 (1982). We therefore do not reach the issues raised by the General Counsel's exceptions. Accordingly, we find it unnecessary to pass on either the Applicant's motion to have the General Counsel's exceptions dismissed or the General Counsel's motion to strike certain portions of the Applicant's answering brief.

[5] Under EAJA, a party must "submit" its application within 30 days of final judgment. In *Monark, supra* at fn. 7, the Board found that "it would be inconsistent to define 'submit' other than we define 'filing.' To interpret 'submit' as 'mailed' . . . would in effect modify the statute's jurisdictional prerequisite."

[6] The 30-day jurisdictional filing period expired on Friday, November 27.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: On October 28, 1981, the Board issued its Decision and Order[1] in the above matter adopting the conclusions and the recommendation for dismissal set forth in my Decision of December 17, 1980. Thereafter, pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, Haynes-Trane Service Agency, Inc. (herein called the Applicant), the Respondent therein, filed on November 30, 1981, an application for an award of fees and other expenses of litigation. Pursuant to the EAJA the Board

[1] 259 NLRB 83.

transferred the application to me for ruling. Thereafter, the General Counsel filed a motion to dismiss and the Applicant filed an opposition. Upon my denial of the motion to dismiss the General Counsel filed an answer and brief in support of answer. This was subsequently followed by the Applicant's reply. On April 24, 1982, I conducted a conference call with counsel and thereafter both parties filed statements to the effect that they were satisfied with the factual record (supplemented at my request by the Applicant's clarification of a billing). Both parties have waived further argument and agree that the matter is now ripe for decision.

Facts Established by the Pleadings

The Applicant is a Colorado corporation engaged in the mechanical contracting business. It sells, installs, and services air-conditioning equipment. When the litigation began it had a main office in Englewood (Denver) and suboffices in Colorado Springs and Cheyenne, Wyoming. It has approximately 20 employees. Its net worth does not exceed $5 million; at the end of 1979 its net worth was $358,000.

The litigation was instituted by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 208 (the Union), which filed an unfair labor practice charge on September 12, 1979, subsequently amended.[2]

Following an investigation the Regional Director issued a complaint alleging that the Applicant had violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act by taking certain employment-connected action against employee Ledford, including ordering him to transfer from Colorado Springs to Denver and discharging him for refusing to transfer, assertedly because of his union activities, including his having testified in a Board representation proceeding. Alternatively, the complaint alleged that the transfer order breached the Applicant's bargaining obligation under Section 8(a)(5) as a unilateral change in the transfer policy by failing to give the Union an opportunity to bargain over it. The complaint also alleged the conduct was designed to undermine the Union's majority support.

The complaint was dismissed on the General Counsel's failure of proof.

In defending the complaint the Applicant incurred legal expenses and fees totaling $12,678.50, a small portion of which covers precomplaint services. This figure is based upon a fee of $85 per hour. There is no issue regarding the resonableness of the time expended by counsel, and, following the statutory EAJA ceiling of $75 per hour, the Applicant claims reimbursement of $11,854.50. In addition, the Applicant seeks an unspecified amount for pursuing its EAJA claim.

Discussion

Although the General Counsel advances three principal defenses to the claim, I shall decide only one. The other two were dismissed in my Order of March 1, 1982.[3] The principal issue which I discuss here is whether the General Counsel was substantially justified in issuing the complaint at all. I conclude that he was not.

In choosing to stand on the record as made at the unfair labor practice hearing the General Counsel concedes that there was nothing more in the Regional Director's investigative file which he was for some reason unable to use. It is also reasonable to assume that he was fully aware of Respondent's defenses. That being the case as both I and the Board (Member Zimmerman partially dissenting, but concurring in the result) have held that the General Counsel failed to make out a *prima facie* case, it appears that the complaint was not substantially justified.

To rebut this inference the General Counsel continues to argue that Respondent harbored union animus and that had certain credibility findings been made a *prima facie* case would have been established. As demonstrated *infra*, however, credibility was not a significant factor in analyzing the merits of this case. He also still asserts that the Applicant had knowledge of the discriminatee's union activities claiming it knew Ledford had signed a union authorization card and attended union meetings. In fact, however, the General Counsel failed to prove the Applicant's knowledge of either of those matters; indeed, Ledford deliberately sent mixed signals to the Applicant regarding his personal views. The General Counsel knew or should have known that to be the case; Respondent had so advised the Board field examiner[4] and Ledford admitted it at the hearing. Thus, the element of knowledge was fuzzy at best. Moreover, contrary to his contention, no union animus is present in the preelection campaign material (G.C. Exhs. 15 and 17). Both are rather bland arguments against union representation. They contain no threats or promises designed to interfere with employees' Section 7 rights. Indeed, they would not even have been sufficient to set the election aside. It was not reasonable for the General Counsel to find animus flowing from those documents. Nor was there any evidence of ostracism as the General Counsel claims. Ledford did testify that he was "ignored" after the election, but one cannot assume that to be ostracism and thus evidence of animus, unless there is more to it than that. Indeed, most employees prefer to be left alone; it is a sign of their employer's confidence in them. Whatever Ledford's subjective view was, the General Counsel was not reasonable in believing it to be evidence of union

[2] This charge, Case 27-CA-6351, was withdrawn, but later refiled on January 8, 1980, under the current docket number shown above in the caption.

[3] The General Counsel had asserted that the EAJA has no applicability to legal services performed prior to October 1, 1981, the effective date of that statute. In denying the motion to dismiss I relied on the statute's policy of liberal construction, but neglected to cite sec. 208 of Pub. L. 96-481, found in the note to 5 U.S.C. § 504, which simply strengthens my conclusion. Also consistent with that view is *United States of America for Jon P. Heydt, Special Agent* v. *Citizens State Bank, Armin Moths and United States Taxpayers Union*, 668 F.2d 444 (8th Cir. 1982), decided but not published when I denied the motion to dismiss on March 1, 1982. The second ground involved the Applicant's failure to affirmatively state that it lacked affiliates. See Board Rule 102.147(f). This matter was fully dealt with in my earlier Order and will not be discussed further.

[4] See Respondent's position letter of October 17, 1979, p. 3. I was unaware of the letter and its contents until it was submitted for purposes of the EAJA claim.

animus. In any event, aside from Ledford's testimony, there was no evidence that ostracism occurred. The General Counsel should have scrutinized Ledford's conclusions more closely, particularly considering the fact that Ledford's office was 70 miles away from headquarters and he was not subject to close supervision due to distance alone. Instead of being evidence of union animus it was more likely evidence of Ledford's glibness.

It is true that Ledford testified in the representation case and his testimony may even be characterized as having been adverse to the Applicant, but no evidence was presented that the Applicant held it against him. The Applicant appeared more concerned that its own witnesses could not testify due to the Regional Director's refusal to grant a continuance to avoid a conflict between that hearing and a previously scheduled trade show. Ledford's testimony was no doubt subordinated to the Applicant's problem with putting on its own case. Indeed, when Ledford's timecard showed a discrepancy regarding his whereabouts while testifying, one of Respondent's officials deliberately decided to ignore it as being of little consequence. Similarly, the sealed envelope in which it placed Ledford's annual appraisal during the election period in order to avoid improperly influencing his vote shows the respect Respondent had for the free exercise of employee Section 7 rights. Thus, we have two instances affirmatively showing lack of union animus.

The final item on which the General Counsel relies to show animus is Service Manager Aldrich's statement shortly after the Union was certified that the Union had brought management "to their knees," later saying that President Haynes "wouldn't have to sign an agreement, he just had to negotiate." Although I analyzed these remarks is the underlying Decision demonstrating that there was a perfectly harmless purpose, I can see where the General Counsel could interpret it as animus, but animus of what? If this were a bargaining case, it might be some evidence of bad-faith negotiating. Yet this is an employment discrimination case. Is such a remark necessarily evidence of an illegal motive within the meaning of Section 8(a)(3) or (4)? I do not think so. At best it creates suspicion, but suspicion alone is not enough to warrant a complaint. Even the suspicion should have evaporated when juxtaposed against the evidence affirmatively showing no animus cited above.

The element of timing has already been discussed in the underlying Decision. The General Counsel now takes my comment about it being a "two-edged sword" and, remarkably, finds in it substantial justification. The context in which it was used, however, demonstrates only that, while on first impression the decision to transfer Ledford appears to be related to the election results, there were also other factors, nondiscriminatory happenings, occurring at the same time, which may well have contributed to the decision. Had animus been present it would have been unreasonable to assume that the timing related to the election. Had that been so, substantial justification may well have been present. Without it, the timing becomes only a neutral factor. Reliance on timing alone is not sufficient to justify a complaint.

The General Counsel next points to an asserted change in the Applicant's transfer policy as giving him substantial justification to make the 8(a)(5) unilateral change allegation. It is based on Ledford's claim (denied by the Applicant) that the Applicant had earlier agreed that he would not be transferred to Denver before any other employee. Coworker Edde even tended to corroborate Ledford. Yet, little, if any, legal analysis was done on the contention. Had it been performed, no complaint could be justified. The cases cited in my Decision[5] clearly hold that a deviation from policy affecting only one employee, as here, is not a breach of Section 8(d) and Section 8(a)(5). Pursuing this theory in the face of clear Board holdings to the contrary is not substantial justification in law within the meaning of the EAJA.

Finally, the "undermining the Union" theory had little substance. The General Counsel, either through commonsense or being advised by the Applicant's position letter, knew or should have known that Ledford's transfer contemplated keeping him in the bargaining unit and could not have numerically undermined it. To argue now, as the General Counsel does, that the Union would be undermined by this adverse act as a demonstration of the Union's powerlessness to remedy it can only be considered an unpersuasive after-the-fact attempted justification without animus evidence such an argument was doomed from the beginning.

One final observation. Member Zimmerman found the General Counsel to have made out a *prima facie* case under Section 8(a)(4)[6] but agreed that it should nonetheless be dismissed because Ledford would have been discharged anyway for his repeated refusals to accept Denver assignments. Assuming the correctness of Member Zimmerman's point of view, it is nonetheless apparent that no substantial justification for the complaint existed. The mere fact that a *prima facie* case can be made is not grounds for a complaint where it is clear that a known defense will overwhelm the *prima facie* case. In this instance it was at all times clear that the defense would prevail. Ledford was given ample time to settle his affairs in Colorado Springs and move to Denver at company expense. Instead, he made plans to open his own business. When he refused the first Denver assignment, the Applicant only warned him; when he refused the second, it only suspended him. It then tolerated a suspicious balk on a third occasion. Plainly, the Applicant had no desire to fire him. But by the fourth occasion Ledford's now clear insubordinate conduct left it no choice. In circumstances such as this the complaint should not have been issued.

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[5] *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., et al.*, 209 NLRB 701 at 704 (1974); and *Brown & Connolly, Inc.*, 237 NLRB 271 (1978).

[6] I can only presume from his silence on the point that Member Zimmerman agreed with the majority that there was no *prima facie* case under Sec. 8(a)(3), nor, perhaps, an 8(a)(4) *prima facie* case regarding Ledford's testifying in the representation case. The unsent letter, on which Member Zimmerman relies, was not known to the General Counsel until the hearing when the Applicant introduced it to rebut a claim of recent fabrication. The 8(a)(4) theory resulting from that letter related to the right to file charges with the Board, a theory not alleged in the complaint.

In conclusion, the General Counsel did not have substantial justification in fact or law to issue the complaint. An award under the EAJA is therefore appropriate.

The Amounts To Be Awarded

1. *Postcomplaint Costs and Fees.* All costs and fees subsequent to the issuance of the complaint on February 19, 1980, are fairly claimable up to the $75 per hour statutory limit. As Applicant's billings reflect 131.45 hours of work at $75 per hour[7] the claim equals $9,858.75. Expenses during that period for duplicating, transcript costs, mailings, mileage, etc., totaled $667.60. The total allowable claim for this period is the sum of those two figures: $10,526.35.

2. *Precomplaint Claim.* The Applicant also seeks fees and costs during the Regional Office's investigation of the two charges preceding the complaint. It claims 17.7 hours for that period, totaling $1,327.50 plus $19.83 in expenses. This includes, without a specific breakdown, time involved in dealing with the Region's investigation and drafting the final position letter discussed, *supra.*[8]

Normally, precomplaint matters are not claimable under the EAJA. However, the Administrative Conference of the United States specifically observed in 46 F.R. 32900 at 32904 that precomplaint fees under the EAJA "will occasionally be recoverable." Specifically, ACUS was referring to advocacy in attempting to persuade an agency not to issue a complaint. In this case, exactly what ACUS contemplated has occurred. Prior to the General Counsel issuing the complaint, the Applicant filed a position letter urging the dismissal of the charge. As it happened, all of the critical factual assertions in the letter were proven at the hearing. As a result the complaint was found to be without merit.

The General Counsel asserts that the conclusions drawn by the Applicant in its letter could not be wholly trusted since, although its witnesses cooperated in the investigation, none would sign affidavits. He argues that he is "loathe to dismiss the charge, without hearing or review, where the Charging Party witnesses swear to affidavits and Respondent's witnesses will not." Frankly, the General Counsel's argument begs the question. If he did not have a *prima facie* case from the Charging Party, as here, he should not have proceeded regardless of the extent of the Applicant's cooperation. The General Counsel concedes here that Applicant cooperated in the investigation refusing only to sign affidavits. Yet, credibility was not a significant question. The circumstances of the transfer order and Ledford's subsequent refusals to accept Denver jobs were fully known. Neither Ledford nor the Applicant's witnesses were in disagreement. The only question the General Counsel had to answer was whether Ledford's or the Applicant's conclusions were the more reasonable. The presence or absence of sworn affidavits from the charged party would have had little effect on that analysis. When the two arguments were scrutinized, both the lack of a *prima facie* case and the reasonable manner of the discharge should have been apparent.

Therefore, I am constrained to allow the Applicant reasonable fees as recompense for the position letter. It was "in connection with" the adversary procedure and was factually accurate. See 5 U.S.C. § 504(a)(1). It should have persuaded the General Counsel to refrain. Yet, he proceeded anyway.

I find the reasonable amount of time expended on that letter was 4 hours, including preparation. At $75 per hour, that amounts to $300. The remainder of the precomplaint claim, including expenses, is disallowed.

3. *Fees and Expenses in Pursuing the EAJA Claim.* The Applicant also claims reimbursement for 44.15 hours work in connection with the pursuit of attorneys fees under the EAJA. At the statutory rate that amounts to $3,311.25 and covers work performed on the EAJA matter to date.

The General Counsel opposes this claim on the ground that the EAJA does not specifically authorize it. Likewise, the Civil Rights Attorneys Fees Awards Act of 1976 (42 U.S.C. § 1988) does not specifically authorize claims for pursuit of fees in the underlying civil rights action. Nonetheless, the Federal appellate courts which have considered the issue have unanimously granted such claims observing that the fee award act would be subverted if the work were not reimbursed. *Love* v. *Mayor, City of Cheyenne*, 620 F.2d 235 at 237 (10th Cir. 1980); *Weisenberger* v. *Huecker*, 593 F.2d 49 (6th Cir. 1979), cert. denied (on other issue) 444 U.S. 880 (1979); *Prandini* v. *National Tea Co.*, 585 F.2d 47 (3d Cir. 1978); cf. *Souza* v. *Southworth*, 564 F.2d 609 (1st Cir. 1977). The logic of these cases is persuasive if not controlling, particularly the *Love* case decided by the Tenth Circuit, where the instant action arose. Accordingly, the Applicant's claim is granted to the extent that its attorneys have expended time pursuing this matter in the amount stated. In addition, the Applicant will be entitled to further fees as reasonably incurred prior to payment of the claim.

CONCLUSIONS OF LAW

1. The Applicant is a prevailing party meeting the eligibility standards of the EAJA.

2. The General Counsel of the National Labor Relations Board was not substantially justified in prosecuting the instant case.

3. The Applicant is entitled to reasonable attorneys fees and expenses totaling to date:

Postcomplaint Fees and Expenses	$10,526.35
Precomplaint Fees	300.00
EAJA fees	3,311.25
	Total $14,137.60

[Recommended Order omitted from publication.]

[7] Attorneys fees were actually charged at $85 per hour.

[8] As previously noted in fn. 2, the position letter dated October 17, 1979, actually deals with Case 27-CA-6351 which was withdrawn on November 16, 1979. The charges were refiled as Case 27-CA-6503 on January 8, 1980. I do not regard that circumstance as affecting the validity of the Applicant's position letter.